

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SANFORD YORONG,
Plaintiff,
v.
TOTAL RENAL CARE, INC.,

No. CV-08-5006-FVS

ORDER GRANTING LEAVE TO AMEND

TOTAL RENAL CARE, INC.,
Defendant

THIS MATTER came before the Court for a telephonic hearing on July 1, 2008. Michael R. Small appeared on behalf of the Plaintiff. William H. White, Jr. appeared on behalf of the Defendant. This order is intended to memorialize and supplement the Court's oral ruling.

BACKGROUND

A. Factual Background

The Plaintiff, Sanford Yorong, is a resident of the State of Washington. The Defendant, Total Renal Care ("TRC"), is a California corporation that owns and operates a number of kidney hemodialysis centers. Am. Compl. ¶ 6. The Plaintiff received hemodialysis treatment at a facility operated by the Defendant in Pasco, Washington. Am. Compl. ¶ 5.

The Amended Complaint alleges that the Plaintiff "sustained injuries as a result of this treatment." *Id.* It further alleges that the Defendant was negligent in maintaining its hemodialysis equipment

1 and that this negligence was the proximate cause of the Plaintiff's
 2 injuries. *Id.* ¶¶ 6-7.

3 **B. Procedural History**

4 The present action is one of at least thirty-two lawsuits that
 5 were originally filed against Gambro Healthcare Renal Care,
 6 Incorporated ("Gambro") by separate plaintiffs in Nevada state court.
 7 The majority of these cases were consolidated in the Eighth Judicial
 8 District Court for the State of Nevada. Following a stipulation by
 9 the parties, Gambro was voluntarily dismissed. The Plaintiff filed
 10 his initial complaint on January 8, 2007. Following the stipulation
 11 in the consolidated action, he filed an Amended Complaint naming TRC.
 12 (Ct. Rec. 31-4).

13 The Defendant subsequently removed the cases pending against it
 14 to various federal court on the basis of diversity jurisdiction. The
 15 Plaintiff's case was transferred from the District of Nevada to this
 16 Court on January 28, 2008. (Ct. Rec. 31.)

17 **I. LEGAL STANDARD**

18 Under Federal Rule of Civil Procedure 12(b) (6), a trial court may
 19 dismiss a complaint that fails to state a claim upon which relief can
 20 be granted. Such dismissal is proper "only when there is no
 21 cognizable legal theory or an absence of sufficient facts alleged to
 22 support a cognizable legal theory." *Siaperas v. Mont. State Comp.*
Ins. Fund, 480 F.3d 1001, 1003 (9th Cir. 2007). For the purposes of a
 23 12(b) (6) motion, all factual allegations set forth in the complaint
 24 are taken as true and construed in the light most favorable to the
 25 plaintiff. *Epstein v. Wash. Energy Co.*, 83 F.3d 1136, 1140 (9th Cir.
 26

1 1996). The Court must give the plaintiff the benefit of every
 2 inference that reasonably may be drawn from well-pleaded facts. *Tyler*
 3 *v. Cisneros*, 136 F.3d 603, 607 (9th Cir. 1998).

4 "Once a claim has been stated adequately, it may be supported by
 5 showing any set of facts consistent with the allegations in the
 6 complaint." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1979,
 7 167 L. Ed 929, 945 (2007) (internal citations omitted). However, the
 8 Court is not required to accept as true conclusory allegations, legal
 9 characterizations, unreasonable inferences, or unwarranted deductions
 10 of fact. *In re Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1403 (9th Cir.
 11 1996).

12 As a general rule, the Court "may not consider any material
 13 beyond the pleadings in ruling on a Rule 12(b)(6) motion." *Lee v.*
 14 *City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). Consistent
 15 with this principle, the Court should not "look beyond the complaint"
 16 to additional facts alleged in the plaintiff's memorandum opposing
 17 dismissal. *Schneider v. Cal. Dep't of Corr.*, 151 F.3d 1194, 1197 n.1
 18 (9th Cir. 1998)). "Facts raised for the first time in plaintiff's
 19 opposition papers should not be considered by the court in determining
 20 whether to grant leave to amend or to dismiss the complaint with or
 21 without prejudice." *Broan v. Bogan*, 320 F.3d 1023, 1027 n. 1 (9th
 22 Cir. 2003) (citing *Orion Tire Corp. v. Goodyear Tire & Rubber Co.*, 268
 23 F.3d 1133, 1137-38 (9th Cir. 2001)).

24 **II. APPLICABLE LAW**

25 A federal district court sitting in diversity must apply the
 26 substantive law of the forum state. *Gasperini v. Center for*

1 *Humanities, Inc.*, 518 U.S. 415, 426-427, 116 S. Ct. 211, 2219, 135 L.
 2 Ed. 2d 659, 673 (1996); *Erickson v. Desert Palace, Inc.*, 942 F.2d 694,
 3 695 (9th Cir 1991) (citing *Erie R.R. v. Tompkins*, 304 U.S. 64, 58 S.
 4 Ct. 817, 82 L. Ed. 1188 (1938)). However, when a case initially filed
 5 in one district court has been transferred to another, "the transferor
 6 state's choice of law rules apply." *Internat'l Bus. Machines Corp. v.*
 7 *Bajorek*, 191 F.3d 1033, 1037 (9th Cir. 1999).

8 Nevada follows the Restatement (Second) of Conflicts of Laws' "most significant relationship test." *Gen. Motors v. Eighth Judicial*
 9 *Dist. Court of State of Nev.*, 122 Nev. 466, 134 P.3d 111, 116 (Nev.
 10 2006). In personal injury actions, the law of the state where the
 11 injury occurred governs unless a party "present[s] some evidence of a
 12 relationship between the nonforum state, the occurrence giving rise to
 13 the claims for relief, and the parties." *Id.* at 117 (citing Restatement (Second) of Conflicts of Laws §§ 6, 146). If such a
 14 relationship is demonstrated, then the court must determine which
 15 state has the most significant relationship to the action using the
 16 principles set forth in Section 6 of the Second Restatement. *Id.* at
 17 116.

20 Here, the Amended Complaint alleges that the Plaintiff was
 21 injured in Washington. Under *General Motors*, Washington therefore
 22 presumptively has the most significant relationship with this action.
 23 While the Plaintiff does not contest that Washington law applies
 24 generally, he argues that the Court should apply Nevada law in ruling
 25 on the issue of punitive damages. Citing *Kammerer v. Western Gear*
 26 *Company*, he contends that Washington permits the recovery of punitive

1 damages when the underlying decision occurred in a state that allows
2 punitive damages. However, the Plaintiff has not introduced any
3 evidence demonstrating that the decision at issue in this case was
4 made in Nevada. Moreover, as the Defendant has observed, *Kammerer* is
5 distinguishable in that the parties to that case agreed that
6 California law would apply. The Court will accordingly apply
7 Washington law in evaluating the Plaintiff's complaint.

8 **III. AMENDMENT**

9 Under the Federal Rules of Civil Procedure, a party may amend its
10 pleading only upon leave of the court once a responsive pleading has
11 been served. Fed. R. Civ. P. 15(a). Courts should grant permission
12 to amend pleadings "freely when justice so requires." *Id.* However, a
13 court need not grant leave to amend when the proposed amendment would
14 prejudice the opposing party, is sought in bad faith, would produce an
15 undue delay in the litigation, or would be futile. *AmerisourceBergen*
16 *Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 951 (9th Cir.
17 2006) (citing *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir.
18 1990)). The court may also deny leave to amend where the moving party
19 knew of the facts it wishes to allege in the proposed amendment at the
20 time of the original complaint and failed to include them. *EEOC v.*
21 *Boeing Co.*, 843 F.2d 1213, 1222 (9th Cir. 1988).

22 Citing Rule 15, the Plaintiff requests permission to amend his
23 complaint. In view of the liberal standard of Rule 15, this request
24 will be granted.

25 **IV. RULE 8**

26 Under the notice pleading requirements of the Federal Rules of

1 Civil Procedure, a complaint in a civil suit must contain "a short and
2 plain statement of the claim." Fed. R. Civ. P. 8(a)(2). "The 'short
3 and plain statement' must provide the defendant with 'fair notice of
4 what the plaintiff's claim is and the grounds upon which it rests.'" *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 346, 125 S. Ct. 1627, 1634,
5 161 L. Ed. 2d 577, 588 (2005) (citing *Conley v. Gibson*, 355 U.S. 41,
6 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)).

7 The Amended Complaint does not satisfy this requirement. It is
8 defective in that it fails to support its legal allegations with
9 allegations of fact. Under *Twombly*, "a complaint must . . . contain
10 either direct or inferential allegations respecting all the material
11 elements necessary to sustain recovery under some viable legal
12 theory." 127 S. Ct. at 1968-69, 167 L. Ed 2d at 944 (2007) (quoting
13 *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir.
14 1984) (ellipsis and emphasis in original)). The Amended Complaint,
15 however, alleges few facts. Rather, it relies upon conclusory
16 allegations of duty, ¶ 7(a), failure to exercise ordinary care, ¶¶
17 7(b)-(d), causation, ¶ 8, and damages, ¶¶ 8-9. Under *Twombly*, more is
18 required.

19 In filing his Second Amended Complaint, the Plaintiff should
20 comply with the requirements of Rule 8 as interpreted by *Twombly*. A
21 complaint alleging facts common to the thirty-two cases pending
22 against the Defendant will not meet this standard. This case is not a
23 class action. The Defendant, and the Court, need to know the basis of
24 this particular Plaintiff's claims.

25
26

V. PUNITIVE DAMAGES

Under Washington law, punitive damages are unavailable except where specifically authorized by statute. *Dailey v. North Coast Life Ins. Co.*, 129 Wash.2d 572, 575, 919 P.2d 589, 590-91 (Wash. 1996). The Plaintiff seeks to recover punitive damages. Am. Compl. ¶ 10. The Court has determined that this case is governed by Washington law. Accordingly, the Plaintiff's request for punitive damages will be dismissed. The Court being fully advised,

IT IS HEREBY ORDERED:

1. The Court **RESERVES RULING** on the Defendant's Motion to Dismiss, Ct. Rec. 65.

2. The Plaintiff's oral request for leave to file an amended pleading is **GRANTED**. The Plaintiff shall file his Second Amended Complaint no later than **August 1, 2008**.

3. The Plaintiff's request for punitive damages is **DISMISSED**.

IT IS SO ORDERED. The District Court Executive is hereby directed to enter this order and furnish copies to counsel.

DATED this 8th day of July, 2008.

s/ Fred Van Sickle
Fred Van Sickle
Senior United States District Judge